...ARY
...PT. U. S.

No. 568.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

CHARLES EDWARD ANDERSON BERRY,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

MERLE L. SILVERSTEIN,
818 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477

No. 568.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

CHARLES EDWARD ANDERSON BERRY,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

ARGUMENT.

The Solicitor-General, in his brief opposing certiorari, concedes that the Eighth Circuit opinion below is in direct and irreconcilable conflict with recent decisions of the Second Circuit:

> "It is true, as petitioner indicates, that the Court of Appeals for the Second Circuit has taken a different approach to the problem. The Second Circuit

> has held that the trial judge must, on the request of the defendant, look at the grand jury testimony of any prosecuting witness and turn over those parts which contain inconsistencies" (Government Brief, pp. 8-9).

This factor alone would seem to warrant certiorari in this case, particularly since the issue involved is highly recurrent in the field of criminal law.

However, the government then attempts to minimize the conflict by explaining that grand jury testimony is normally transcribed in New York whereas relatively little such testimony is recorded "in other parts of the country." Since this assertion is quite beyond the record herein, and does not appear to be founded upon any statutory or decisional law, petitioner (whose counsel's practice and experience has been geographically limited to a narrow midwest area) is not in a position to either affirm or dispute the distinction. Assuming *arguendo* that the government is correct in this observation, it nevertheless appears to have little pertinency to the issue involved. In the first place, the grand jury testimony in the instant case was actually transcribed and in the possession of the assistant district attorney (see Footnote 1, page 7, of Petition for Certiorari). Secondly, neither the Eighth Circuit opinion below (opposing inspection) nor any of numerous Second Circuit decisions (requiring inspection) give even the slightest indication or implication that their respective opinions are influenced by the prevailing practices in regard to transcribing grand jury testimony. Indeed, it seems quite inconceivable that a United States Court of Appeals would formulate a vital procedural rule of law, in direct conflict with other circuits, by relying on some unofficial custom adopted in one of the states within its jurisdiction. The distinction thus offered by the government is far-fetched, and clearly fails to explain or justify the open conflict between the Eighth and Second Circuits.

The balance of the Solicitor General's argument is devoted to an examination of the specific facts and circumstances of the instant case in an effort to demonstrate on the merits that the *in camera* inspection was properly refused. Petitioner had deliberately avoided a discussion of the substantive merits under the impression that a petition for certiorari should not involve legalistic arguments more properly reserved for an actual appeal. Nevertheless, since the government has seen fit to delve into the subject in order to justify the Eighth Circuit opinion, petitioner feels constrained to reply, albeit with brevity.

The basic argument of the government, as well as the Eighth Circuit, is that the grand jury transcript could not possibly have helped the defendant. In this regard, the government lapses into the same error as the Eighth Circuit, for both insist that the only material fact in issue was whether petitioner had intercourse with the female (Govt. Brief, p. 8; Petition for Certiorari, Appendix, p. 21). This is manifestly incorrect. The real, and only, issue was whether the interstate transportation was for an immoral purpose; the intercourse, if proven, is only a circumstance to be considered in determining the over-all nature of the trip. See **Mortensen v. United States**, 322 U. S. 369.

With this in mind, the Court's attention is respectfully directed to the fact that the female prosecuting witness testified at the trial that petitioner had intercourse with her virtually every night from the time they first met—in a Tucson motel room, in the back seat of a moving automobile (at high speed) with three unaware persons in front, in a Denver hotel, and every night in St. Louis at petitioner's secretary's home and in her presence (R. 30, 34, 37, 38, 41, 48, 79). Is it not possible that her grand jury testimony might contain material deviations from such a lengthy and detailed recital? The purpose of checking the grand jury testimony, therefore, was not to

disprove any particular act of intercourse; rather it was to ascertain whether or not this girl of questionable background was telling the **truth**. For example, if this heavily guarded grand jury transcript disclosed that she testified consistent with her trial testimony on some matters, but wholly inconsistent on other material items, the latter factor might influence the jury to disbelieve her entire testimony. Or if her grand jury testimony, given at a time when her memory was most fresh, omitted material matters which she swore to at the trial, the jury could well become skeptical of her honesty. This became all the more crucial when it is remembered that this girl's testimony was the only direct evidence against petitioner. The entire case was primarily her word against his.

Therefore, because many of the facts were not in dispute does not minimize (as the government and Eighth Circuit suggest) the importance of testing the credibility of this chief prosecuting witness; if the jury did not believe her story, as opposed to petitioner's testimony of adamant denial, the petitioner would necessarily have been acquitted.

The second substantive factor urged by the government is that the girl already had been subjected to a searching cross-examination on the basis of prior statements and testimony. This is true, but hardly provides any reason for the trial court to refuse to inspect the grand jury testimony. It is obvious that a witness's grand jury testimony, usually shortly after the defendant's arrest (less than two weeks, in the instant case), is more spontaneous and uninhibited than trial testimony which is presented after interviews and conferences with the prosecuting authorities. Furthermore, the prior statements of the witness in the instant case did reveal some material deviations which should have at least excited the curiosity of the trial judge as to what lay hidden in the otherwise sacrosanct grand jury transcript.

This leads to the government's third and final substantive contention, which is simply that the girl's trial testimony did not reveal any "need for further probing." In this regard, the Solicitor-General is more influenced by the remarks of the trial court (R. 179-180) than by the transcript itself. Although the district judge "thought she told a pretty straight story," the transcript reveals numerous material contradictions (R. 74-76, 82, 83, 109-110). In addition, many parts of her testimony were contradicted by other witnesses for both the government and the defense.[1] She also admitted that a prior written statement she had signed was incorrect (R. 139-140). A discussion of these many inconsistencies and contradictions would serve no useful purpose at this time; petitioner merely desires to point out the government's oversight in claiming that the girl's testimony revealed no reason for further test.

All of these matters now urged by the government have been considered, at one time or another, by the Second Circuit. None has been found to provide a sufficient reason to exempt the trial court from the duty of making an *in camera* inspection (see **United States v. Zborowski**, 271 F. 2d 661 and other cases cited in Petition for Certiorari, p. 10). What the government is now doing is simply opposing certiorari in the instant case by advancing those same arguments which it unsuccessfully urged in the numerous Second Circuit cases. This further demonstrates the present need for certiorari on this issue, for despite numerous rejections by the Second Circuit the government still insists that its arguments possess vitality.

One undeniable fact stands out among all others, and is conceded by the government: if the trial of petitioner

---

[1] The witness's testimony as to LeRoy Davis (R. 73) was denied by Davis (R. 174-175). Her testimony concerning a statement to local police (R. 83) was contradicted by the officer himself (R. 331). Her denial of a statement to police (R. 127) was refuted by the officer (R. 328).

had taken place **anywhere** in the Second Circuit, the conviction would have unquestionably been reversed! In the Eighth Circuit, it has been affirmed. This inconsistency must be ultimately resolved, so that the fate and freedom of future defendants will not hinge on such an irrelevant criterion as the geographical situs of the trial.

Respectfully submitted,

.....

MERLE L. SILVERSTEIN,
818 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.